STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 26, 2003
v	No. 236118 Calhoun Circuit Court
LARRY TERRILL CAVER, Defendant-Appellant.	LC No. 01-000081-FC

Before: Bandstra, P.J., and Gage and Schuette, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of bank robbery, MCL 750.531, felony-firearm, MCL 750.227b, resisting arrest, MCL 750.479, armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a, conspiracy to commit bank robbery, MCL 750.157a, and carrying a concealed weapon, MCL 750.227. The trial court sentenced defendant as an habitual offender, MCL 769.12, to terms of forty to sixty years' imprisonment each for the bank robbery and armed robbery convictions, two years' imprisonment for the felony-firearm conviction, ten to fifteen years' imprisonment for the resisting arrest conviction, and eighteen to thirty years' imprisonment each for the carrying a concealed weapon, conspiracy to commit bank robbery, and conspiracy to commit armed robbery convictions. On defendant's motion, the trial court vacated defendant's convictions and sentences for armed robbery and conspiracy to commit armed robbery. Defendant now appeals as of right. We affirm defendant's remaining convictions but remand for resentencing.

This case arises out of the December 22, 2000 robbery of a TCF Bank in Marshall by two men wearing nylon masks. A vehicle matching the description of the getaway car was seen by the police, and after a short, high-speed chase, the vehicle flipped over and both defendant and the second individual, Charles Clemens, were apprehended in possession of money stolen from the bank. One witness observed both suspects before they donned masks as she was leaving the bank. This witness identified both defendant and Clemens as the robbers.

Defendant first argues the trial court erred in failing to suppress a witness' in-court identification because the identification was tainted by an impermissibly suggestive confrontation during the preliminary examination. Defendant has waived review of this issue by failing to provide a transcript of the trial court's ruling or a transcript of the evidentiary hearing that took place before a different judge, on which the trial court apparently based its decision. MCR 7.210(B)(1)(a); *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974); *People v*

Petrella, 124 Mich App 745, 755; 336 NW2d 761 (1983), aff'd 424 Mich 221 (1986). However, as defendant alleges a constitutional violation, based on a de novo review of the record, we find defendant's claim fails.

If a witness is exposed to an impermissibly suggestive pretrial procedure, the witness' in-court identification is not allowed unless the prosecution shows by clear and convincing evidence that the witness' in-court identification is sufficiently supported independent of the prior identification procedure. *People v Colon*, 233 Mich App 295, 305; 591 NW2d 692 (1998); *People v Kurylczyk*, 443 Mich 289, 302; 505 NW2d 528 (1993). The defendant must show that the procedure was so suggestive under the totality of the circumstances that it led to a substantial likelihood of misidentification. *Id*. In examining the totality of the circumstances, relevant factors include: the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of a prior description, the witness' level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation. *Colon, supra* at 304-305; *Kurylczyk, supra* at 306.

Here, the available record establishes that the witness' period of observation of defendant on the day of the robbery was brief, but her attention to detail was great. The witness testified that she remained relatively calm, initially thinking the robbery was a joke but then having the presence of mind to hide her wallet when she realized it was not a joke when she saw one of the robbers with a handgun. There is no evidence the witness provided a contrary description of the robbers at any time and her description of both the robbery and the robbers was consistent with other witnesses. The witness' identification was positive, and from her testimony, her identification was clearly based on her encounter with the robbers. Thus, although the confrontation at the preliminary examination may have been suggestive because the codefendants were dressed in orange, *Colon, supra* at 305, the totality of the circumstances does not establish that the preliminary examination was so suggestive as to lead to a substantial likelihood of misidentification, *Kurylczyk, supra* at 302, 306; *Colon, supra* at 305.

Defendant next raises several issues of prosecutorial misconduct. Defendant first contends he was denied a fair trial when the prosecutor failed to disclose certain witness statements until mid-trial. These statements include written statements obtained by the bank. The trial court's rulings concerning discovery are reviewed for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998). An abuse of discretion occurs only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *Id*. Further, the trial court's determination of an appropriate remedy if a discovery violation occurs is reviewed for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

It was established at trial that the investigating officers knew of the statements made to the bank and that they thought the statements were provided with the report given to the prosecutor. However, the prosecution contended that it was unaware of the statements. Assuming the failure to disclose the witness statements was a discovery violation, we find nothing to contradict the trial court's finding that the violation was inadvertent, and further find that the record does not establish any prejudice to defendant. Both the trial court and the prosecutor noted that the late-provided statements contained nothing inconsistent with what the witnesses had testified, and that both counsel had more extensive police statements to prepare their examinations. Further, and most telling with regard to the lack of prejudice to defendant, is

the fact that defense counsel failed to recall a single witness for further cross-examination after the statements were provided. Therefore, we find the trial court did not abuse its discretion in denying defendant's motion to strike the testimony.

Defendant also claims that the prosecution improperly shifted the burden of proof during closing argument. Defendant failed to preserve this claim by timely objecting and requesting a curative instruction, *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998), therefore, our review is for clear error, *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Defendant theorized at trial that a third person actually committed the robbery, not defendant. In closing argument, the prosecutor addressed defendant's theory by asking why defendant fled from the police instead of telling them about this third person. The prosecutor also stated that defendant did not tell the police of this third person and that the prosecutor's evidence was uncontroverted. Under the circumstances, defendant's claim that the prosecutor improperly shifted the burden of proof is without merit. The prosecutor did not shift the burden of proof by merely attacking the credibility of a theory advanced by defendant at trial – that another person committed the crime. See *People v Godbold*, 230 Mich App 508, 521; 585 NW2d 13 (1998); *People v Fields*, 450 Mich 94, 114-116; 538 NW2d 356 (1995). The prosecutor merely argued that the evidence proved defendant's guilt beyond a reasonable doubt, despite defendant's exculpatory view of the evidence. See, e.g., *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Regardless, even if the complained-of comments were prejudicial, reversal is not required because defendant has failed to show clear error – that the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of defendant's innocence. *Schutte*, *supra* at 720.

Defendant next argues that the trial court erred in denying defendant's request for a forensic examination. MCL 768.20a provides that on the filing of a notice of the intent to assert an insanity defense, the trial court "shall order the defendant to undergo an examination relating to his or her claim of insanity . . . ." While the trial court recognized its statutory obligation, the court required defense counsel to make "some showing" of a "history of psychological/psychiatric treatment," before the court would order a forensic examination. The statute is clear and leaves no room for the trial court to require production of some evidence that the defense of insanity may be viable before ordering a forensic examination. See *People v Chapman*, 165 Mich App 215, 218; 418 NW2d 658 (1987). Therefore, the trial court erred in denying the forensic examination.

Although the trial court erred by conditioning a forensic examination on some showing of mental illness, the error does not require reversal. Had defendant produced some evidence of mental illness, the trial court would have ordered a forensic examination, but because defendant could produce no such evidence, the court denied the request. Under the circumstances, defendant cannot and has not shown that the error affected the reliability of the verdict. See *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000).

Defendant next argues that the prosecution presented insufficient evidence to support the felony-firearm conviction. We review a claim of insufficient evidence de novo, *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999), viewing the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found all the

elements of the offense were proved beyond a reasonable doubt, *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), mod 441 Mich 1201 (1992). Further, this Court must make all reasonable inferences and resolve all credibility conflicts in favor of the jury verdict. *Nowack, supra* at 392.

One witness identified defendant as one of the two bank robbers. She also testified that the shorter of the two bank robbers was armed with a handgun. One of the bank tellers testified that she observed one of the bank robbers with a handgun. She testified that she was able to look eye-to-eye with the robber. In a courtroom demonstration, the witness stood eye-to-eye with defendant and stated that she believed they were the same height. Two other bank tellers testified that of the two bank robbers, the taller one held the bag of money while the shorter one possessed a handgun. Several photographs taken from the bank's security cameras depicted the robbery, as well as one of the robbers with a gun. No weapons were ever recovered by the police.

The question facing the jury concerning the felony-firearm charge was whether to believe the witness testimony, together with the photographic and other evidence, that defendant possessed the handgun. The jury obviously resolved the factual questions in favor of conviction. We will not interfere with the factfinder's determination of witness credibility or the weight to be given to the evidence. *Wolfe, supra* at 514-515; *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

Finally, defendant raises several sentencing issues. The trial court originally sentenced defendant to terms of forty to sixty years' imprisonment each for the armed robbery and bank robbery convictions and terms of eighteen to thirty years' imprisonment each for the conspiracy convictions. Defendant thereafter brought several post-conviction motions, requesting in part that either the armed robbery and conspiracy to commit armed robbery or the bank robbery and conspiracy to commit bank robbery convictions be vacated and that defendant be resentenced. At the motion hearing, the prosecutor agreed that one of the robbery and conspiracy convictions should be vacated on double jeopardy grounds, but that resentencing was not required. The prosecutor originally requested that the bank robbery and conspiracy to commit bank robbery convictions be vacated; however, the trial court noted that in vacating those convictions, the felony-firearm conviction would also be vacated. Therefore, the trial court vacated the armed robbery and conspiracy to commit armed robbery convictions but refused to resentence defendant.

According to the record, the sentencing information report prepared in this case established the guidelines for only the armed robbery conviction. No guidelines were established for defendant's bank robbery conviction. It appears the trial court imposed the same forty to sixty-year prison term for defendant's bank robbery conviction as the armed robbery, based on the guidelines scored for the armed robbery conviction.

Armed robbery and bank robbery are both categorized as crimes against persons, but armed robbery is a class A offense and bank robbery is a class C offense. At sentencing, the trial court scored defendant's PRV at 60 points and his OV at 85 points. Defendant's recommended

minimum sentence range for armed robbery was 171 to 570 months. However, because bank robbery is a lower class offense, the minimum sentence range for bank robbery would be significantly less.[1]

Ordinarily, where the Legislature does not intend multiple punishments, and one of two convictions must be vacated, the general rule is to affirm the conviction of the higher offense and vacate the conviction of the lesser offense. See *People v Herron*, 464 Mich 593, 598, 610-611; 628 NW2d 528 (2001); *People v Harding*, 443 Mich 693, 714; 506 NW2d 482 (1993). Although bank robbery and armed robbery both carry a maximum penalty of life in prison, the legislative guidelines classify bank robbery as the equivalent of unarmed robbery, a lesser offense. MCL 777.16y; MCL 777.62; MCL 777.64. While, in contravention of the established rule, the trial court vacated the greater offense of armed robbery, neither the prosecutor nor defendant takes issue with the court's decision.[2]

MCL 777.21(2) regards the scoring of the legislative guidelines and reads, "If the defendant was convicted of multiple offenses, subject to section 14 of chapter IX, score each offense as provided in this part." This statute has been interpreted to mean that every offense must be scored. See *People v Mutchie*, 251 Mich App 273; 650 NW2d 733 (2002), aff'd 468 Mich 50 (2003); *People v Cook*, 254 Mich 635, 640; 658 NW2d 184 (2003). MCL 777.14 addresses the preparation of presentence investigation reports, and provides that the guidelines must be scored for each crime having the highest crime class.

Here, the trial court scored the guidelines for armed robbery. However, the trial court vacated that conviction and sentence, thus making the bank robbery conviction the highest conviction. Under the legislative guidelines, a trial court must impose a sentence within the appropriate minimum sentence range. MCL 769.34(2); *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001). A trial court may depart from the appropriate sentencing guidelines range only when it finds and states on the record a substantial and compelling reason for doing so. MCL 769.34(3); *Hegwood*, *supra* at 439. Here, the trial court was required to sentence defendant for the bank robbery conviction using the appropriate minimum sentence range for bank robbery, or state on the record substantial and compelling reasons for any departure from the guidelines. MCL 769.34(3); *Hegwood*, *supra* at 439. Because the trial court did not do so, resentencing is required. On resentencing, the trial court must determine the appropriate guidelines range for the bank robbery conviction and either sentence defendant within that range or state on the record his reasons for departing from the range.

Defendant also argues that the trial court incorrectly scored several offense variables, including OV 1 (aggravated use of a weapon), MCL 777.31, OV 13 (continuing pattern of criminal behavior), MCL 777.43, OV 14 (offender's role), MCL 777.44, and OV 19 (interference with the administration of justice), MCL 777.49. With regard to OV 1 and OV 14,

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[1] Using the same point totals that the trial court arrived at, the minimum sentence range for bank robbery would be 58 to 228 months.

[2] Because neither party disputes the trial court's ruling in this regard, we render no opinion with regard to whether the trial court properly vacated the armed robbery convictions.

we find that the scores assigned by the trial court were adequately supported by the evidence. Further, because defendant failed to cite supporting authority with regard to OV 13, his failure to address the merits of his assertion of error with regard to this variable constitutes abandonment of the issue.[3] See *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). However, we find merit with defendant's argument regarding the scoring of OV 19.

The trial court assigned ten points under OV 19, which authorizes assigning ten points where the defendant "otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). In *People v Deline*, 254 Mich App 595; 658 NW2d 164 (2002),[4] this Court interpreted the statute and found that "interference with" the administration of justice is equivalent to "obstruction of" justice, which the Court held was limited to an effort to undermine or prohibit the judicial process. *Id*. at 597-598. In that case, the defendant attempted to evade OUIL charges by switching seats with the passenger of his vehicle and refusing an immediate blood-alcohol content test. The Court held that a defendant does not "engage in any conduct aimed at undermining the judicial process" where he tries to evade the charges altogether. Here, although defendant's attempted flight was much greater than that of the defendant's in *Deline*, defendant's flee from the police was not as much an attempt to undermine the judicial process as it was an attempt to evade apprehension and the subsequent charges altogether. Therefore, the trial court erred in assigning ten points under OV 19.[5] *Deline*, *supra*.

We affirm defendant's convictions but vacate defendant's sentences and remand for resentencing. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Hilda R. Gage
/s/ Bill Schuette

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[3] Because the SIR was prepared for the armed robbery conviction, we find nothing to preclude defendant from taking issue with the scoring of this offense variable should he be scored the same on resentencing.

[4] We note that the Supreme Court granted the prosecutor leave to appeal in this case on July 3, 2003.

[5] We note that in *People v Cook*, 254 Mich App 635; 658 NW2d 184 (2003), this Court addressed the issue whether ten points could be properly be assigned under OV 19 for one conviction when it is already properly allocated in connection with a sentence for another conviction arising out of the same incident. In that case, the defendant conceded that his conduct of evading the police appropriately formed the basis for the imposition of ten points under OV 19 in connection with his sentence for the fleeing and alluding conviction, but challenged the use of the same conduct to score ten points under OV 19 to calculate the defendant's sentence for an assault conviction. This Court held that where the crimes involved constitute a continuum of conduct, it is reasonable to consider the entirety of the defendant's conduct in calculating the sentencing guideline range with respect to each offense. However, this Court was not asked to address whether the defendant's conduct in fleeing the police warranted the imposition of ten points under OV 19; therefore, this Court did not address the decision in *People v Deline*, 254 Mich App 595; 658 NW2d 164 (2002).